



¶1 Following a jury trial, appellant Bert John was convicted of aggravated driving under the influence of an intoxicant (DUI) while his license was suspended, canceled, revoked, refused, or restricted and aggravated driving with a blood alcohol concentration of .08 or more with two prior DUI convictions. The trial court suspended the imposition of sentence and imposed concurrent, three-year terms of probation with credit for time served to satisfy a mandatory four-month prison term.

¶2 On appeal, John argues the trial court erred by ordering him to pay “non[-]mandatory” costs, including fees, surcharges, and assessments totaling \$6,855, without first evaluating his financial ability to pay. He asks that, at the very least, we vacate the attorney and indigent assessment fees and remand this matter for reconsideration of the other fees. With the exception of a \$750 mandatory fine, John seems to suggest that many, if not all, of the other sums imposed were discretionary, although he has specifically requested that we vacate only the attorney fees and indigent assessment fee. The fees, fines, surcharges, and assessments imposed included the following: a \$50 monthly probation fee; a \$10 probation surcharge; a \$20 time-payment fee; \$400 in attorney fees; a \$750 mandatory fine, plus a \$600 surcharge on that fine; a \$25 indigent assessment fee; a \$250 payment to the DUI Abatement Fund; and payments of \$1,500 each to the Prison Fund and the State General Fund.

¶3 John did not object to the imposition of the attorney or indigent assessment fees when they were imposed at his arraignment. Nor did he object when those fees were

reimposed along with the other fees at sentencing. In the absence of any objection below, we review solely for fundamental error. *State v. Henderson*, 210 Ariz. 561, ¶ 19, 115 P.3d 601, 607 (2005). Fundamental error is “error going to the foundation of the case, error that takes from the defendant a right essential to his defense, and error of such magnitude that the defendant could not possibly have received a fair trial.” *Id.*, quoting *State v. Hunter*, 142 Ariz. 88, 90, 688 P.2d 980, 982 (1984). To obtain relief on this ground, John must demonstrate not only that such error occurred but also that he was prejudiced by it. *Id.* ¶ 20.

¶4 We recently addressed the very issue John has raised in *State v. Moreno-Medrano*, 218 Ariz. 349, 185 P.3d 135 (App. 2008). Like John, Moreno-Medrano challenged the imposition of attorney fees and an indigent assessment fee on the ground that the trial court had failed to first ascertain his ability to pay them. *See id.* ¶ 7. As we noted in that case, before imposing fees pursuant to A.R.S. § 11-584 and Rule 6.7(d), Ariz. R. Crim. P.,<sup>1</sup> a trial court is required to make specific factual findings regarding a defendant’s

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<sup>1</sup>Section 11-584(B)(1) authorizes the trial court to assess the defendant “an indigent administrative assessment of not more than twenty-five dollars,” while § 11-584(B)(3) permits the court to require a defendant to repay “a reasonable amount to reimburse the county for the cost of the defendant’s legal defense.” And, § 11-584(C) provides that “[i]n determining the amount and method of payment the court shall take into account the financial resources of the defendant and the nature of the burden that the payment will impose.” In addition, Rule 6.7(d), Ariz. R. Crim. P., provides that if a court determines a defendant has the resources to offset the costs of legal services, the court shall require the defendant to pay the amount the defendant is able to pay “without incurring substantial hardship.”

ability to pay the fees imposed and that the fees will not cause a substantial hardship. *Moreno-Medrano*, 218 Ariz. 349, ¶ 9, 185 P.3d at 139. “The court must also make a finding regarding the actual cost of the legal services provided.” *Id.*

¶5 Although it is unclear what financial information the trial court had before it, like the court in *Moreno-Medrano*, the court here did not make any express findings regarding John’s financial status either at arraignment or sentencing. *See id.* ¶ 10. Relying on *State v. Lopez*, 175 Ariz. 79, 82, 853 P.2d 1126, 1129 (App. 1993), a case in which Division One held that the trial court’s failure to make the required findings before imposing attorney fees constituted fundamental error, John argues the court’s failure to make such findings here also constituted fundamental error. We rejected this argument in *Moreno-Medrano*, finding that in light of *Henderson*’s more recent clarification of the fundamental error standard, “this part of *Lopez* is no longer correct and . . . the imposition of the fees without the findings [regarding defendant’s financial status] was not fundamental error.” *Moreno-Medrano*, 218 Ariz. 349, ¶ 13, 185 P.3d at 139.

¶6 In any event, John has failed to show that the trial court prejudicially failed to consider his financial ability to pay. *See State v. Medrano*, 185 Ariz. 192, 196, 914 P.2d 225, 229 (1996) (“Judges are presumed to know and follow the law and to consider all relevant sentencing information before them.”). At sentencing, the court indicated that it had reviewed the presentence report. The probation officer noted in the report that, since 2005, John had earned \$15 per hour working as a full-time carpenter and that he had been

employed in various construction jobs from 1992 through 2005. John reported he had “a construction job awaiting [him] upon [his] release,” a fact his employer confirmed in a letter to the court. John also reported his wife<sup>2</sup> is employed, a fact she confirmed in a letter she submitted to the court, in which she stated, “I currently work for the University of Arizona as a Contracts Administrator and Notary Public and have been in my position for over eight years.”

¶7 Although the probation officer reported that John had “few assets,” she opined that the trial court reasonably could expect him to pay ten percent of his gross income toward assessments. The officer concluded that “the defendant does have the ability to contribute to the cost of his legal defense” and recommended that the court order John to pay \$400 in attorney fees, which it did. At sentencing, defense counsel told the court she had reviewed the presentence report and raised no objection to its contents. The record simply does not support John’s argument that the court’s purported failure to consider his ability to pay rises to the level of fundamental, reversible error. *See Henderson*, 210 Ariz. 561, ¶¶ 22, 24, 115 P.3d at 608 (appellant has burden to show fundamental error and prejudice).

¶8 Relying on *State v. Torres-Soto*, 187 Ariz. 144, 927 P.2d 804 (App. 1996), John also suggests that because the record contains “no information” to support the amounts

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<sup>2</sup>John contends on appeal that he was not married and that he has “no community property interests in his girlfriend’s wages.” The presentence report suggests otherwise.

imposed, the trial court would have erred even if it had made the requisite findings on the record. We rejected this same argument in *Moreno-Medrano*, and concluded that *Torres-Soto* was distinguishable on the facts. *See Moreno-Medrano*, 218 Ariz. 349, ¶ 15, 185 P.3d at 139-40. In *Torres-Soto*, the court had found the \$85,500 in surcharges imposed to be fundamental error, noting that “were it not for the fundamental error in imposing \$85,500 in surcharges, we would not vacate this unobjected-to imposition of attorney[] fees.” 187 Ariz. at 145, 927 P.2d at 805. Like *Moreno-Medrano*, John did not object to the fees or assessments or to the court’s failure to make findings. *See Moreno-Medrano*, 218 Ariz. 349, ¶ 15, 185 P.3d at 140. As we concluded in that case, “[t]he ‘overriding considerations’ present in *Torres-Soto* are simply not present here.” *Moreno-Medrano*, 218 Ariz. 349, ¶ 15, 185 P.3d at 140.

¶9 We affirm the convictions and the probationary terms. In the absence of fundamental error, we also affirm the fees and assessments imposed.

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PETER J. ECKERSTROM, Presiding Judge

CONCURRING:

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PHILIP G. ESPINOSA, Judge

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GARYE L. VÁSQUEZ, Judge